

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

JEREMY DUNCAN, a fictitious name)
pursuant to SLR 2.035,)
)
Plaintiff,)
)
vs.)
)
STATE OF OREGON; OREGON YOUTH)
AUTHORITY; MICHAEL LEE BOYLES;)
ROBERT JESTER; JOSEPH MESTETH;)
KAREN BRAZEAU; and JOHN AND)
JANE DOES 1-10,)
)
Defendants.)

Civil Case No. 05-1747-KI (*Lead Case*)

CONSOLIDATED CASES

OPINION AND ORDER

Robert G. Thuemmel
Thuemmel & Uhle
210 S.W. Morrison Street, Suite 600
Portland, Oregon 97204

Attorney for Plaintiff Duncan

John D. Ryan
503 S.W. Colony Drive
Portland, Oregon 97219

Attorney for Plaintiff Duncan

Erin K. Olson
2905 N.E. Broadway Street
Portland, Oregon 97232

Attorney for Plaintiff W.P.C.,
Munoz Estate, and M.D.

Michelle R. Burrows
618 N.W. Glisan Street, Suite 203
Portland, Oregon 97209

Attorney for Plaintiff M.A. and D.H.M.

Randall Vogt
2125 S.W. 4th Avenue, Suite 600
Portland, Oregon 97201

Attorneys for Plaintiff J.D.

David L. Kramer
James S. Smith
State of Oregon
Department of Justice
1162 Court Street, N.E.
Salem, Oregon 97301-4096

Attorneys for State Defendants

Michael Lee Boyles
Swiss #681118
Multnomah County Sheriff's Office
Justice Center
1120 S.W. 3rd Avenue
Portland, Oregon 97204

Pro Se Defendant

KING, Judge:

Defendants Oregon Youth Authority, Gary Lawhead, and Havan Jones seek to have the State of Oregon substituted in their places under the Oregon Tort Claims Act (“OTCA”), ORS 30.265(1). Most plaintiffs object to the substitution. They rely on the recent holding in Clarke v. Oregon Health Sciences University, 206 Or. App. 610, 138 P.3d 900, rev. allowed, 349 Or. 449 (2006), that the OTCA substitution provision violates the remedy clause contained in Article I, Section 10 of the Oregon Constitution, as applied to the Clarke plaintiff, because the damages cap against the substituted defendant of \$200,000 acts to deny a substantial substitute remedy when compared to plaintiff’s alleged economic damages of \$12 million. Id. at 633. At least one plaintiff before me also intends to amend his complaint on completion of discovery to allege that some actions of individual government defendants are outside of the scope of employment and thus not governed by the OTCA.

Defendants contend that Clarke will be reversed by the Oregon Supreme Court, which recently granted review. Assuming that I follow Clarke, I hesitate to make a decision based on an as-applied basis when discovery of damages is on-going. Some complaints may still be amended. Moreover, as defendants note, I am not obliged to adopt Clarke, an opinion from the Oregon Court of Appeals, and would require substantial briefing from all on that issue. I see no prejudice in continuing the case in its current posture for now. Defendants may renew their motion when discovery is closed and other dispositive motions are filed. Alternatively, they may renew the motion after trial, when damages have been proven.

///

Stipulated Motion to Substitute State of Oregon for Oregon Youth Authority, Gary Lawhead and Havan Jones on Tort Claims pursuant to ORS 30.265 (#65) is denied with leave to renew as explained above.

IT IS SO ORDERED.

Dated this 1st day of November, 2006.

/s/ Garr M. King
Garr M. King
United States District Judge